FILED
AUG 17 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-2039

In The

Supreme Court of the United States

October Term, 1997

ALAN HAVIGHURST and DOUGLAS HAVIGHURST,

Petitioners,

vs.

THE FIRST NATIONAL BANK OF SOUTHWESTERN OHIO, Executor of the Estate of WALTER HAVIGHURST, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Ohio, Butler County

BRIEF IN OPPOSITION FOR RESPONDENT MIAMI UNIVERSITY

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STATEMENT PURSUANT TO RULE 29.6

Miami University is a public institution of higher education, established and operating pursuant to the laws of the State of Ohio. *See*, Ohio Rev. Code § 3345.011 and Ch. 3339. It is not a private corporation. Accordingly, it has no parent companies or subsidiaries.

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Respondent Miami University respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the Twelfth District Court of Appeals of Ohio, Butler County, a copy of which appears in Appendix A of the Petition for Writ of Certiorari (at 3a-25a) and is unreported elsewhere.

STATEMENT OF THE CASE

The First National Bank of Southwestern Ohio, trustee under the will of the late Dr. Walter E. Havighurst, initiated this declaratory judgment action, pursuant to Ohio Rev. Code § 2107.46, in furtherance of its fiduciary duty, in order to assure that the intent of the testator is followed. Named as defendants were heirs of Dr. Havighurst; beneficiaries under his will, including Miami University; and the Attorney General of Ohio, as required by Ohio Rev. Code § 109.25. Petitioners Alan and Douglas Havighurst filed answers and counterclaims in which they opposed the Bank's position and requested a declaration from the probate court that the gift in trust had failed. Answers supporting the Bank's position were filed on behalf of the Ohio Attorney General, Miami University, and several heirs of Walter Havighurst, including Sam and Ruth Neff.

The case proceeded to a bench trial on September 5 and 6, 1995, with active participation by the Bank, Alan Havighurst, Miami University, the Ohio Attorney General's Office, and Sam and Ruth Neff. Petitioner Douglas Havighurst was not present at the trial. The probate court issued its Opinion and Judgment Entry of Declaratory Judgment on December 15, 1995. Petition for Certiorari,[1] p. 39a. Following a request from petitioners, the probate court, on February 20, 1996, issued its Findings of Fact and Conclusions of Law, P.C., p. 68a, as well as its Amended Judgment Entry of Declaratory

1. The Petition for Certiorari will be referenced hereinafter as: P.C.

Judgment, P.C., p. 87a. Petitioners took their appeal to the Court of Appeals for the Twelfth Appellate District of Ohio which, after full briefing of all issues, issued its Opinion and Judgment Entry, P.C., pp. 3a, 26a, on June 2, 1997, affirming the probate court's judgment. Petitioners filed a motion in support of jurisdiction with the Ohio Supreme Court, which declined to exercise jurisdiction in an Entry dated October 1, 1997, P.C., p. 93a. Petitioners' motion for reconsideration was likewise denied by the Ohio Supreme Court on November 12, 1997, P.C., p. 94a.

Contrary to representations contained in petitioners' brief, P.C., p.8, Chief Justice Thomas Moyer did not dissent from either of the Ohio Supreme Court's decisions in this case. Both decisions were unanimous, as was the opinion of the Court of Appeals.

STATEMENT OF FACTS

Dr. Walter E. Havighurst died on February 4, 1994. His Last Will and Testament, dated October 11, 1989 and admitted to probate February 11, 1994, created a testamentary trust, referred to as the Walter E. Havighurst Fund, by giving certain assets in trust to The First National Bank of Southwestern Ohio.

The Will, at Article III. G., contains a detailed residuary bequest which explicitly creates a charitable trust, and directs that trust funds be used for

> . . . educational projects through the Miami University International Center, Oxford, Ohio for building cross-cultural understanding between the peoples of the United States of America and the Union of Soviet Socialist Republics.[2]

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2. Relevant excerpts of the Will are included in the trial court's Findings of Fact. P.C., p. 68a.

The will also contains a set of nine guidelines for the implementation of these educational projects, P.C., p. 102a. Even though the U.S.S.R. has ceased to exist, the trustee bank believes that it can carry out the expressed intentions of Dr. Havighurst and fulfill its fiduciary responsibilities as trustee. Transcript of docket and journal entries 1; Transcript of proceedings 19, 27.[3]

Subsequent to Dr. Havighurst's death, Miami University instituted a systematic review of ways in which Dr. Havighurst's intentions could be carried out through the development of appropriate programs within the University. It stands ready, willing and able to implement such programs. T.p. 59-76.

At trial, each side called an expert witness. *Both* experts supported the Bank's position that the Trust should be fully implemented. The probate court's factual findings are contained in the Findings of Fact and Conclusion of Law, P.C., p. 68a. They are fully supported by the record and will not be repeated here. However key points from the experts' testimony are summarized below.

Mr. Paul Goble, an expert in international affairs and the former Soviet Union, was called on behalf of the Bank. He testified, at T.p. 100-150, as follows:

- The country formerly known as the Union of Soviet Socialist Republics (U.S.S.R.) no longer exists as a political entity. The U.S.S.R. ceased to exist in December, 1991.

- The peoples of the region formerly know as the Soviet Union (F.S.U.) still exist. The people and territory are

3. The Transcript of docket and journal entries of the probate court will hereinafter be referenced as: T.d. The Transcript of proceedings in the probate court will be referenced as: T.p.

the same, but the political system is different. The cultures of the F.S.U. have not changed dramatically.

- In academic programs, the F.S.U. region is still treated as an integrated whole. Studies of the area and its peoples are still critically important in the United States despite the fall of the U.S.S.R.

- The region of the F.S.U. has been extremely unstable politically since 1991. Despite the demise of the U.S.S.R., there are ongoing serious concerns about nuclear weapons that are still present in the F.S.U. ". . . [T]he end of the Soviet Union is the most important political challenge to the United States since 1918."

- The United States is lacking in qualified experts with respect to the newly independent states that formerly were part of the U.S.S.R. As a result ". . . we have an enormous deficit of understanding. . ." of the region. The need for study of and contact with this region is now greater than it was before 1991.

- The ability to develop people-to-people contacts was far more limited in 1988 through 1990 than it is today.

- Dr. Havighurst's will reflects a ". . . deep long-standing American belief that talking to people, getting to know people will improve the situation." It does not reflect fears or concerns about the U.S.S.R.

- Each of the nine guidelines contained in the Havighurst will ". . . can be realized taking into consideration changes in nomenclature in the region. . . ."

- In international affairs, the term "peoples" refers to a human group constituted by language, religion, culture; a group that can be either larger or smaller than a country. The term "peoples" does not include governments.

- The term "culture" can be broadly defined as a continuous interaction among a human group or community where the level of interaction is greater among the members of the group than between members of the group and outside individuals.

The expert witness called by petitioners, Heather Hogan, testified, at T.p. 157-184, as follows:

- She endorses the efficacy of university-based cross-cultural programs with the F.S.U.

- As a result of the fall of the U.S.S.R., there have been dramatic social changes in the F.S.U. These have led to greatly increased opportunities for university exchange programs that previously were not possible.

- She herself has benefitted from travel to, and study in, the F.S.U. While in the F.S.U. she has observed such things as art, architecture, museums, and the cultures of the peoples. She considers observations and studies of the political culture to be essential in her teaching. She believes that student travel and study in any other country is beneficial and should be supported. She endorses the importance of cross-cultural programs and exchanges. She believes it is important to understand ethnic tensions, as well as the peoples of the area, their cultures, religions, and differences.

- She advocates Russian and Soviet studies at the university level in the context of a liberal arts education. In the context of the Havighurst will, she believes that the study of the Soviet Union is still important. She believes there are all sorts of needs for continuing study in the area of the F.S.U., and that the study of the area is "as necessary as always."

REASONS FOR DENYING THE WRIT

I.

THE PROBATE COURT ACTED WITHIN ITS DISCRETION, AND IN FULL COMPLIANCE WITH CONSTITUTIONAL REQUIREMENTS, IN DENYING THE PETITIONERS' REQUEST FOR A JURY TRIAL IN A DECLARATORY JUDGMENT ACTION TO CONSTRUE A TESTAMENTARY TRUST.

In their first question presented for review, Petitioners contend that the issues raised in this declaratory judgment action should have been decided by a jury. This argument is without merit. By way of background, it is clear that petitioners had no right to a trial by jury as a matter of Ohio constitutional law. "There is no right to a jury trial . . . unless that *right* is extended by statute or existed at common law prior to the adoption of our state Constitution." *Kneisley v. Lattimer-Stevens Co.*, 40 Ohio St. 3d 354, 356, 533 N.E. 2d 743 (1988) [emphasis in original; internal citations omitted]. In *Sorrell v. Thevenir*, 69 Ohio St. 3d 415, 633 N.E. 2d 504 (1994) the Ohio Supreme Court considered the right to jury trial in negligence cases. The Court held that the Ohio Constitution ". . . does not guarantee a jury trial in all cases, but only for those causes of action where the right existed a common law at the time the Ohio Constitution was adopted." Since negligence actions did

exist at common law at the time of the adoption of the state Constitution, the right to a jury trial is a fundamental right in negligence and other common law actions. It is not a right, fundamental or otherwise, in non-common law proceedings, such as statutory and equitable actions. The Ohio Supreme Court has also clearly held that a right to jury trial does not exist if the relief sought is equitable rather than legal. *Taylor v. Brown*, 92 Ohio St. 287, 110 N.E. 739 (1915); *Digital & Analog Design Corp. v. North Supply Co.*, 63 Ohio St. 3d 657, 590 N.E. 2d 737 (1992). This case, involving a petition by a trustee for guidance from the probate court, is predominantly equitable in nature, as the appellate court correctly held. P.C., p. 13a.

It is also clear that petitioners had no right to a jury trial as a matter of Ohio statutory law. Section 2101.31 of the Ohio Revised Code gave the trial judge in this case discretion to dispense with a jury:

> All questions of fact shall be determined by the probate judge, unless he orders them tried by a jury, or referred, as provided in sections 2101.06 and 2101.07, and sections 2315.26 to 2315.37, inclusive, of the Revised Code.

Petitioners place reliance on Ohio Rev. Code § 2311.04 which provides a right to jury trial in actions initiated in the general division of the common pleas court and seeking "the recovery of money only, or specific real or personal property." The interplay between these two statutes has been addressed by the Ohio courts, which have rejected petitioners' argument that Ohio Rev. Code § 2311.04 is controlling. In *Renee v. Sanders, Exr.*, 160 Ohio St. 279, 116 N.E. 2d 420 (1953), the Ohio Supreme Court held, at paragraphs 1-5 of the syllabus, that:

> 1. An action for declaratory judgment is a civil action.

> 2. Where the subject matter of a cause of action is within the jurisdiction of the Probate Court, an action thereon for a declaratory judgment instituted in the Probate Court is governed by the rules of trial procedure applicable to trials in the Probate Court.
>
> 3. No party to a declaratory judgment action instituted in the Probate Court has any constitutional or absolute statutory right to a trial by jury.
>
> 4. Where an action for declaratory judgment is properly instituted in the Probate Court, Section 12102-9, General Code (Section 2721.10, Revised Code), does not guarantee any party thereto the right to a determination of the issue of facts involved by a jury.
>
> 5. Where an action for declaratory judgment is properly instituted in the Probate Court, [R.C.] Section . . . 2101.31 . . . is applicable, and the questions of fact arising in the trial of the issues shall be determined by the probate judge unless upon his own initiative or upon request of either party the probate judge shall, in the exercise of his discretion, order such questions of fact to be tried by a jury or referred as otherwise authorized in the statutes.

This holding has been followed in *Bobko v. Sagen*, 61 Ohio App. 3d 397, 572 N.E. 2d 823 (Cuyahoga County 1989) and *Giurbino v. Giurbino*, 89 Ohio App. 3d 646, 626 N.E. 2d 1017 (Cuyahoga County 1993), as well as in this case.

Having failed to establish their right to a jury trial under Ohio law, petitioners attempt to demonstrate that they have

such a right under the United States Constitution. They do not. The right to trial by jury in civil actions under the Seventh Amendment to the United States Constitution is not applicable to the states, *Minneapolis & St. Louis RR. Co. v. Bombolis*, 241 U.S. 211, 36 S. Ct. 595, 60 L. Ed. 961 (1916). Furthermore, under the Seventh Amendment, the right to jury trial does not exist in those actions, like this case, in which the relief sought is equitable. *Ross v. Bernhard*, 396 U.S. 531, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970).

Finally, petitioners certainly do not have a viable claim under the Equal Protection Clause of the Fourteenth Amendment. Most fundamentally, their quest for a jury trial was not adversely affected by the pendency of this action in the probate court rather than in the general division of the Court of Common Pleas. This is because petitioners *do not meet the requirements of the Code section upon which they rely*, Ohio Rev. Code § 2311.04. That statute only allows for jury trials in actions "for the recovery of money only, or specific real or personal property." As the Court of Appeals correctly found, there simply was never any claim for recovery of money, or of any other property, in this case. The fact that the distribution of the estate might have been different had petitioners prevailed does not convert this equitable declaratory judgment proceeding into an action for recovery of money or property. Accordingly, and contrary to petitioners' contention, the availability of a jury trial did not turn on the happenstance of whether the proceeding was initiated in the general division or the probate division of the Court of Common Pleas.

Petitioners have cited no authority supporting their equal protection claim, nor any case which has found a fundamental right to a jury trial in a declaratory judgment action to interpret a testamentary trust. For instance, in *Pratt v. Natl. Distillers & Chem. Corp.*, 853 F.2d 1329 (6th Cir. 1988), *cert. denied*, 489

U.S. 1012, 109 S. Ct. 1121, a jury trail right established by statute was simply held to prevail as against an inconsistent local rule of court. In *Cleveland Ry. Co. v. Halliday, Admr.*, 127 Ohio St. 278, 188 N.E. 1 (1933), a tort case, the jury trial right being asserted was held to be substantive, not remedial, and therefore not subject to retroactive change under Ohio law. Accordingly, these decisions do not support petitioners' equal protection claim in this equity case.

Since this probate court proceeding was statutory, the petitioners' right to a jury trial existed only to the extent that it was conferred by the state legislature. The appellate court was clearly correct in affirming the denial of petitioners' demand for a jury trial.

II.

A DETERMINATION BY THE PROBATE COURT THAT A CHARITABLE TRUST ESTABLISHED BY A DECEDENT MAY BE FULLY IMPLEMENTED DESPITE CHANGED CIRCUMSTANCES DOES NOT RESULT IN AN UNCONSTITUTIONAL TAKING OF PROPERTY FROM RELATIVES OF SUCH DECEDENT. THE PETITIONERS HAVE NO PROPERTY INTEREST SUFFICIENT TO RAISE A CLAIM OF UNCONSTITUTIONAL TAKING.

Contrary to petitioners' argument, the Havighurst trust in fact does not create any reversionary interest in the testator's heirs; nor have petitioners pointed to any language of the will whereby any such reversionary interest was created. The fact that the testator's heirs might at some speculative future time have a reversionary claim by operation of law has nothing to do with this finding, which merely reflects the terms of the trust instrument itself.

Petitioners contend that Miami University, as the beneficiary of a testamentary charitable trust, is required to pay them compensation as a condition of receiving the very benefits intended by the testator. This argument is both unsupported and unsupportable. *Babbitt v. Youpee*, 519 U.S. 234, 117 S. Ct. 727, 136 L. Ed. 2d 696 (1997), cited by petitioners, invalidated an act of Congress which purported to grant certain Indian property to the Indian tribe without compensation, preventing the owners of such property from disposing of it by descent or devise. In this case, the probate court's order certainly is not preventing such disposition; on the contrary, it is carrying out the wishes of the owner, Dr. Havighurst, as expressed in his will. The fact that a state court order may constitute "state action," *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836 (1948), does not advance petitioners' position. As to the Ohio case law reviewed by petitioners in their brief, suffice it to say that the Ohio courts were not persuaded by petitioners' interpretation of those authorities as applied to this case.

Petitioners complain that the probate court's declaratory judgment effected the "extinguishing of [their] reversionary interests." P.C., p.26. The probate court's decision did no such thing. The probate court did not have the power to, nor did it in fact, create a gift to, or for the benefit of, Miami University. The decedent, Dr. Havighurst, created the gift. The probate court's function was merely to advise and instruct the trustee as to the proper administration of the trust created by Dr. Havighurst. Contrary to petitioners' argument, an unconstitutional taking of property no more occurred in this case than it would have in the absence of probate court involvement. Obviously, the testamentary gift was from Dr. Havighurst to the trustee, not to the petitioners. Petitioners never had this property, and it was never taken from them.

"As part of a takings case, the plaintiff must show a legally-cognizable property interest." *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1580 (Fed. Cir. 1993). Petitioners have not shown such an interest. There is no evidence in the record to show that the petitioners — two nephews of the decedent — would inherit anything at all if the gift in trust were to fail. In fact, petitioners' brief affirmatively shows that neither of them would inherit anything if Dr. Havighurst's charitable bequest were to fail: The Ohio Statute of Descent and Distribution, Ohio Rev. Code § 2105.06 (at P.C., p. 100a), shows that, without surviving spouse or children, the decedent's siblings would be the next to inherit in the event of intestacy; while the probate court record (at P.C., p. 107a) shows that the decedent left no spouse or children, but was survived by a sister, Miriam Havighurst.

Petitioners' reasoning on this point is tantamount to arguing that the law does not recognize a charitable testamentary gift to a public institution of higher education. This argument is clearly wrong.

> Governments (whether national, state or local) have as primary objects the furnishing of facilities and services which will make the lives of their citizens comfortable and safe. They carry benefits of a social nature to large groups. Trusts for governmental or municipal purposes are therefore charitable.

Bogert on Trusts, § 378, p. 191. In particular, trusts to promote understanding between peoples of different races, religions and nations, *Mills v. Montclair Trust Co.*, 139 N.J. Eq. 56, 49 A.2d 889 (1946), and to promote peace and world understanding, *In re Peck's Estate*, 168 Cal. App. 2d 25, 335 P.2d 185 (1959), *cert. den.*, 361 U.S. 826, *reh. den.*, 361 U.S. 903, have been held to be charitable. Petitioners have never

disputed the proposition that the advancement of education is a legitimate charitable purpose.

Miami University is a state institution of higher education established by the State of Ohio, with a board of eleven trustees appointed by the governor. *See*, Ohio Rev. Code Ch. 3339 and § 3345.011. It is a public educational institution that qualifies as the object of charitable donations. In fact the board of trustees is specifically authorized by statute to receive, and hold in trust, charitable donations, Ohio Rev. Code § 3345.16.

It is difficult to see how any court could adjudicate issues arising under wills and trusts without determining whether heirs at law have reversionary interests. If the Bank had been wrong, and the gift had been held invalid, then various heirs might have had reversionary interests. Conversely, if the gift in trust is valid, then other potential claimants do not have any legally cognizable interest in the trust property. This is not adjudicating future rights; it is the performance of the proper function of the probate court.

The Petition for Writ of Certiorari pending before this Court is without substance. The trial of this case in the probate court was free from error prejudicial to the petitioners. The probate judge's findings and conclusions are amply supported by the record. The legal issues raised by petitioners were thoroughly reviewed by the Court of Appeals and decided in accordance with well-settled case law. This case presents no substantial constitutional question. Accordingly, this Court is urged to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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